

USAWC STRATEGY RESEARCH PROJECT

**STRATEGIC LAWYERING: REALIZING THE POTENTIAL OF
MILITARY LAWYERS AT THE STRATEGIC LEVEL**

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ABSTRACT

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Military lawyers provide legal advice at the tactical, operational, and strategic levels of war in six functional disciplines, but the war on terrorism is placing increasingly complex demands on lawyers advising warfighters, particularly at the strategic level. This study examines how the spectrum of legal analysis, advice, and advocacy required at the strategic level must expand to more effectively support the war on terrorism. Legal advisors to strategic leaders must consider and provide both proactive and responsive legal advice and support in "lawfare" -- the use of law as a weapon of war. The war on terrorism is a war of ideology. Lawyers, who receive specialized training with emphasis on effective analysis, reasoning, advice, and advocacy, must play a direct and indirect role in winning this war of ideology. This study reviews examples of strategic issues in which military lawyers could have played a larger role and contributed to better issue resolution and argues that the military should employ legal support more aggressively to address strategic-level concerns. Finally, recommendations are offered for reducing the gap between current Army legal advisors' roles and those which this study considers desirable.

STRATEGIC LAWYERING: A CALL TO ARMS FOR MILITARY LAWYERS AT THE STRATEGIC LEVEL

In the morning of 8 April 2003, Task Force 4-64 of the 2d Brigade Combat Team, 3d Infantry Division (Mechanized) was engaged in fierce fighting in the center of Baghdad, near the Republican Palace, Al Rashid Hotel, and Al Jumhuriya Bridge across the Tigris River from the Palestine Hotel.¹ By a stroke of luck, Task Force 4-64 managed to capture a two-way Motorola radio on a frequency still being used by the enemy and intercept radio transmissions from an enemy forward observer thought to be located in a high-rise building across the Tigris River.² Task Force Soldiers already receiving indirect fire were informed of the existence of the forward observer and began a search to find him.³ Task Force Soldiers observed a tripod and “some kind of optics” in a high-rise building approximately 1700 meters to the south – perhaps a ground/vehicular laser locator designator, a tripod mounted laser targeting device.⁴ After obtaining permission to engage, the Soldiers fired a High Explosive Anti-Tank (HEAT) round into the Palestine Hotel.⁵ Occupying the Palestine Hotel were approximately 100 reporters and cameramen observing and filming the battle occurring across the river.⁶ Spanish cameraman Jose Couso was wounded in the explosion and subsequently died of his wounds.⁷

On 21 April 2003, Secretary of State Colin Powell forwarded a letter to the Foreign Minister of Spain, stating that the U.S. “share[s] your sorrow over Mr. Couso’s death” and adding that “Mr. Couso’s death occurred in a war zone during an ongoing battle. . . . our forces responded to hostile fire appearing to come from a location later identified as the Palestine Hotel.”⁸ In May 2003, Mr. Couso’s next-of-kin filed a complaint in Spanish criminal court.⁹ On 14 October 2003, the Spanish federal criminal court accepted the complaint and on 19 October 2005 issued international arrest warrants for three U.S. Soldiers, including the company and battalion task force commander.¹⁰ The prosecutor for the court filed an appeal of the warrant, arguing that the court lacked jurisdiction under the circumstances.¹¹ Nonetheless, it is expected that the Interior Ministry of Spain will inform Interpol of the arrest warrants.¹² Under tough questioning about the court’s action the next day, the U.S. Ambassador to Spain stated that bilateral relations between the U.S. and Spain had “not been negatively affected” by the court’s decision.¹³

This single military action in the early days of Operation Iraqi Freedom almost immediately embroiled the U.S. military and its legal advisors in complaints against U.S. Soldiers in foreign courts and an international incident and two years later in criminal indictments, Interpol referrals, and potential impacts on international relations. This example, and countless others like it,

illustrates how the war on terrorism places increasingly complex demands on lawyers advising warfighters at the tactical, operational, and especially at the strategic level. The variety and import of legal issues at the strategic level are continually increasing and it is time to examine how the spectrum of legal advice and advocacy required at the strategic level ("strategic lawyering") must change to more effectively support the war on terrorism. While strategic lawyering would not have saved Mr. Couso, strategic lawyering is vital when incidents like the death of Mr. Couso occur.

Strategic lawyering requires both proactive and responsive legal advice and support in "lawfare" -- the use of law as a weapon of war. Many strategists suggest that winning the war on terrorism will require winning a war of ideology including the use of effective international collective action. Lawyers, who receive specialized schooling and training with emphasis on effective analysis, reasoning, advice, and advocacy, must play a direct and indirect role in winning this war of ideology. This study analyzes the capabilities of military legal advisors at the strategic level to support the war on terrorism using their specialized legal training, education, and experience and considers how commanders at the strategic and operational level may use this support best. The study reviews examples of strategic issues in which military lawyers could have played a larger role and contributed to better issue resolution and argues that the military should employ legal support more aggressively when addressing strategic-level concerns. Finally, recommendations are offered for reducing the gap between current Army legal advisors' roles and those which this study considers desirable.

The Strategic Level of War and Strategy

Three levels of war are described in current Army doctrine: strategic, operational, and tactical. These categories are to be used as doctrinal perspectives to clarify the relationships between strategic objectives and tactical actions.¹⁴ The strategic level is "that level at which a nation . . . determines national and multinational security objectives and guidance and develops and uses national resources to accomplish them."¹⁵ Strategy recently has been defined as: "*the use that is made of force and the threat of force for the ends of policy.*"¹⁶ This definition is similar to the model espoused at the U.S. Army War College, which analogizes strategy as a three-legged stool balancing ends, ways, and means.¹⁷ Use of the military instrument of power to achieve the U.S. National Security Strategy is addressed in the National Defense Strategy and National Military Strategy.¹⁸ The transformation of national level strategy and policy into theater strategy occurs at the strategic level of war.¹⁹ Combatant commanders are central in the process of translating strategic direction into operational plans and execution.²⁰ The

planning and execution of campaigns is the transition point between the strategic and operational level of war.²¹

Thus, the strategic level of war is executed at the combatant command level and higher and within the Department of Defense encompasses the roles, missions, and functions of the combatant commands, defense agencies, Military Departments, Service Chiefs, the Office of the Chairman, Joint Chiefs of Staff (and Joint Staff), and the Secretary of Defense (and Office of the Secretary of Defense). Lawyers are assigned to and legal support is provided throughout these many and varied strategic-level organizations.²²

Current Army Doctrine on Legal Support to Operations

Current Army doctrine establishes that legal support to operations falls into three functional areas: command and control, sustainment, and personnel service support. The practice of operational law involves providing those legal services that directly affect the sustainment and command and control of an operation.²³ There are six core legal disciplines: administrative law, civil law (including contract, fiscal and environmental law), claims, international law, legal assistance, and military justice.²⁴ By doctrine, Army judge advocates have three fundamental objectives: supporting the mission (protecting and promoting command authority); providing service (meeting the legal needs – generally personal needs – of commanders, staffs, personnel, and family members); and enhancing legitimacy (engendering public respect and support for military operations, through, among other things, promoting justice and ethical behavior).²⁵

Doctrine recognizes that judge advocates in the 21st Century will be challenged in accomplishing their objectives. In particular, to accomplish missions Army judge advocates must thoroughly understand the military mission to better forestall and resolve legal issues affecting the mission and “must become more involved in the military decision-making process in critical planning cells, and at lower levels of command.”²⁶ In accomplishing their objective of enhancing legitimacy, judge advocates will have to transmit their thorough understanding of U.S. values and Constitutional and international law to assist commanders in integrating these laws and values into military operations.²⁷

Current Army doctrine does an excellent job of articulating legal support at the tactical and operational levels of war, describing legal disciplines and providing an overview of Army judge advocate roles, functions, and challenges. Current Army doctrine, however, fails to adequately address how Army judge advocates specifically, and military legal advisors to senior strategic leaders generally, should operate at the strategic level in the current legally-intensive security

environment, including the ongoing war on terrorism.²⁸ Current doctrine does not adequately address the uses of the Army lawyer's trained and ready mind when providing candid advice referring not only to the law but also to "moral, economic, social, and political factors."²⁹ Finally, doctrine does not make the most use of the fact that military lawyers often operate across all levels of war at the same time, and interact with and provide advice to all elements of a command and staff – working both laterally and horizontally within the organization – and, thus, are well-placed to think globally about issues that affect the organization.

Increase in Legal Issues

It is apparent after any cursory review of national news that legal issues related to military operations are increasing. Within the last few months, the popular media have exhaustively discussed and dissected issues as disparate as prosecution of military personnel for abuses at Abu Ghraib, legal status of detainees, the legal status of terrorists, the legality of pre-emptive war, and prosecution of alleged war crimes perpetrators before the International Criminal Court. Part of the increasing pace of legal issues affecting the military can be attributed to the steady increase of substantive international law after World War II, starting with the founding of the United Nations (UN) and issuance of the Geneva Conventions of 1949, through the numerous arms control and human rights treaties and conventions more recently.³⁰ Increasingly demanding international law constraints and domestic concerns result in the U.S. military being subject to high expectations and significant regulatory guidance.³¹ Globalization – the ever-increasing interdependent nature of life throughout the globe – also naturally increases the amount and impact of law internationally because of the need for effective regulation of commerce and information flow for commerce to flourish.³²

Also, current U.S. national security strategy is inextricably intertwined with legal issues and lawyering. One of three goals of the President's National Security Strategy (NSS) is "respect for human dignity."³³ In championing human dignity, the U.S. must stand for liberty and justice, the rule of law, and limiting the absolute power of the state.³⁴ To achieve the goals of the NSS, the U.S. will, among other things, "champion aspirations for human dignity" and "develop agendas for cooperative action with other main centers of global power."³⁵ In developing agendas for cooperative action, consultation and common action are necessary to "sustain the supremacy of . . . common principles."³⁶

The National Defense Strategy (NDS) – the Secretary of Defense's implementation of the NSS – states that the U.S. has "a strong interest in protecting the sovereignty of nation states." The NDS, however, also says that nations must ". . . exercise their sovereignty responsibly, in

conformity with customary principles of international law. . . ."³⁷ The NDS finds that international partnerships are "a principal source" of the strength of the U.S. and that the U.S. will play a leading role on "issues of common international concern."³⁸ Of the four strategic objectives of the NDS, two relate to international relations: the U.S. must "strengthen alliances and partnerships," and establish conditions "conducive to a favorable international system. . . ."³⁹ The NDS outlines an approach that, among other things, "seeks to create conditions conducive to respect for the sovereignty of nations and a secure international order."⁴⁰ This strategy is designed to secure and improve the international order, but nations must "exercise their sovereignty responsibly, in conformity with international law. . . ."⁴¹ The United States must use international partnerships as a "principal source" of strength, act collectively, and play leading roles in international fora and on international issues.⁴² To meet strategic challenges the NDS requires the military to, among other things, transform the global defense posture through transforming old and forming new alliances and partnerships and ensuring international agreements reflect the current strategic circumstances and support the greatest possible operational flexibility.⁴³ This approach is echoed in the most recent strategy document for the defense of the nation, the 2006 Quadrennial Defense Review Report (QDR). Among other things, it states that "building and leveraging partner capacity" will be absolutely essential and that "[w]orking indirectly with and through others, and thereby denying popular support to the enemy, will help transform the character" of the war on terrorism.⁴⁴ These are only a few of the NDS and QDR instructions that implicitly and explicitly require legal resources to execute.

Lawfare: The Use of Law as a Weapon of War

This increase in legal issues impacting warfare and the military has spawned a new term: "lawfare." First discussed by Brigadier General Charles J. Dunlap⁴⁵ in a seminal paper he released in 2002, the term has several meanings. Brigadier General Dunlap defined lawfare as simply the use of law as a weapon of war – a means of realizing a military objective.⁴⁶ In his paper he raises the question whether the growth of substantive international law – including the increase in international agreements and organizations – is undercutting the ability of the United States military to accomplish its missions. In particular, he examines whether international law and the Law of Armed Conflict (LOAC)⁴⁷ is being used by America's adversaries to constrain America's power. For example, use of lawfare against the United States would include cynically manipulating the LOAC to undermine United States and international support for a military operation, potentially restricting or completely stopping the military effort.⁴⁸ He examines the International Criminal Tribunal for Yugoslavia (ICTY) review of the NATO airstrike on 23 April

1999 against Radio Television Serbia as a potential violation of the LOAC and the lawsuit before the European Court of Human Rights regarding the same airstrike as examples of the use of legal process potentially constraining military decision-makers.⁴⁹ Ultimately, Brigadier General Dunlap concludes that while the role of the law and lawyers in the American military exists for practical and altruistic reasons “there is disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself.”⁵⁰

Since Brigadier General Dunlap’s paper, the term lawfare has seen increasing use. It has been used generally to indicate the “ill-intentioned use of international law and the courts to harm American interests.”⁵¹ Lawfare also has been defined as “the pursuit of strategic aims, the traditional domain of warfare, through aggressive legal maneuvers.”⁵² Lawfare has been sufficiently recognized to be the subject of two Roundtables held by the Council on Foreign Relations (CFR). The CFR Roundtables concluded that lawfare results from the intersection of globalization and the emergence of international law; is defined as the strategy of using or misusing law as a substitute for traditional military means to achieve military objectives; and the use of lawfare is expanding.⁵³

Lawfare includes use of asymmetrical methods of warfare that violate the LOAC, for example the use of human shields and attacks from protected places.⁵⁴ Lawfare also includes actions in peacetime by nations, international groups, and service organizations to restrict the activities of the United States military through international treaties, conventions, etc.⁵⁵ Thus, lawfare includes the long-used tactic of nations collectively acting to create restrictive international conventions and then pressuring hegemonic nations to be bound by those restrictions as a means of limiting the hegemon’s power.⁵⁶ That is, traditional international relations theory holds that states will balance against concentrations of power.⁵⁷ Significant scholarship today argues that because the United States is so strong that this balancing of power must occur not through direct challenges to the United States but rather through use of nonmilitary tools “to delay, frustrate, and undermine aggressive unilateral U.S. military policies” using international institutions, economic statecraft, and diplomatic arrangements.⁵⁸ Although the issue of the so-called “soft balancing” is strongly disputed, there appears consensus that weaker states consistently act together, including through the use of international organizations and conventions and for a variety of reasons, to constrain stronger states.⁵⁹ As the sole global hegemon,⁶⁰ the United States must be concerned with lawfare in this form.

Brigadier General Dunlap’s concern that the law is being “hijacked” is echoed by other commentators. One author finds in a recent article: “a rising trend in the frequency and severity

of adversary violations of [the law of armed conflict] and humanitarian principles to gain a strategic advantage.”⁶¹ Another warns that: “. . . lurking in the back of the minds of commanders is the threat of international condemnation and possible calls for prosecution when errors are made, as they inevitably will be in the confusion of battle.”⁶² The CFR roundtable expressed a similar concern.⁶³ Other commentators pose the possibility of a legal “decapitation strike” against the President or military commander – that is, using a personal lawsuit to harass and distract the leader.⁶⁴ Ultimately, concern about the misuse of the law by our enemies to achieve their objectives has made its way into our strategy documents. The National Defense Strategy notes that a significant strategic vulnerability for the United States is that it will be challenged by those who use international fora and judicial processes to further their ends.⁶⁵

Other commentators dispute that lawfare is a risk to military operations. They argue that conducting military operations in a manner fully consistent with international law and the LOAC does not constrain the military and actually helps the United States win its conflicts. This line of analysis dismisses concerns about constraints on U.S. military force imposed through international law, sovereignty-constraining treaties, or “soft balancing,” and, more importantly, maintains that concerns about lawfare have eroded the United States’ respect for the international law with negative consequences in the war against terrorism.⁶⁶ Because America is a democracy founded under the rule of law (the Constitution, et. al) it is asserted that America must act in accordance with law, even when confronted with serious threats, or risk losing its foundation in values.⁶⁷ Additionally, as America often functions in, or desires to function in, a military coalition, it is pointed out that America cannot afford to be viewed by the international community as completely disregarding international law and the LOAC.

Fundamentally, lawfare in its broadest meaning represents both risk and opportunity for the United States military. Substantive international law is becoming increasingly more complex. Application of the LOAC, particularly given the increasing accuracy of many weapons in the United States’ inventory and the urban nature of counter-insurgency warfare, is becoming ever more nuanced. These increasing challenges give opportunities to our opponents to challenge and obstruct in legal fora and the “court of world opinion.” In today’s complex, interrelated, and well-publicized environment, law has inexorably become a tool of war. Like all tools of war, the use of law in war is neither inherently right nor wrong. It is how the law is used that defines its nature.

Thus, military attorneys cannot cede to the enemy the use of law as a weapon of war. They must embrace the concept of lawfare, recognizing that the use of law as a weapon of war is a permanent part of military operations. In today’s environment, lawfare encompasses the

actions that U.S. military attorneys take, and advise their clients to take, to maintain legitimacy, ensure the greatest freedom of action, consistent with domestic and international law, and fight and win the Nation's wars.

Strategic Lawyering and Proactive Defensive Lawfare

Lawyers at the strategic level, at a minimum, must be able to recognize lawfare when it occurs and react appropriately. Optimally, military lawyers should address lawfare that may damage U.S. defense interests before the damage occurs. That is, in general, legal issues are decided by application of the law to the particular facts in question. Proactive lawfare, therefore, is working in advance of issues arising to shape the law and facts in such a way that our clients' interests will be supported when the issues do arise.

In addressing defensive lawfare, one first must realize that non-enemies can successfully execute lawfare resulting in strategic impacts on the U.S. For example, some assert that the International Committee of the Red Cross (ICRC) has employed lawfare against the U.S. – working through legal fora to constrain U.S. power.⁶⁸ The first step in addressing lawfare by non-enemies is knowledge about their efforts. That is, the strategic level attorney must maintain familiarity with the arguments and efforts that are being made in international fora that can have a negative impact on United States security and military operations. By tracking these efforts, the strategic-level attorney can either deploy resources under his or her control, or more likely, interface with higher headquarters attorneys or attorneys at other U.S. Government agencies and assist those attorneys in working to shape the future.

Along with knowledge – that is, “spotting the issue” – the DoD must devote sufficient personnel and resources to adequately address the concern. That is, is the DoD devoting sufficient resources to advocating U.S. interests before the various international organizations that consider issues that may result in legal limitations and have negative impacts to U.S. security and military operations? Active participation has the benefit of defending the U.S. from unmanageable restrictions as U.S. participation helps shape the nature of the discussion and resolution of issues. Additionally, active participation demonstrates the U.S. is taking a leadership role in the international community and supports the national security strategies' objectives of engagement and use of coalitions.

An example of a proactive lawfare in the area of international convention and treaties would be the U.S. initiating a review of and suggesting changes to current international treaties and conventions concerning status of combatants who do not comply with the LOAC.⁶⁹ Working towards, and ultimately obtaining, international consensus on this contentious issue

would demonstrate U.S. respect for international law and would be a proactive measure to improve U.S. stature in the international community. It would be a means of “taking the fight” to the international community that endlessly criticizes the U.S. policy regarding unlawful combatants.⁷⁰ Successful resolution of this issue would also benefit the U.S. military by ensuring the continuance of the absolute status protection currently granted under the LOAC to military personnel operating in conformity with the LOAC requirements.⁷¹ Proactive lawfare, of course, requires a careful weighing of risks and benefits. Thus, proactively seeking international consensus on the status of unlawful combatants has its risks which must be weighed against the potential gains. The point for strategic level lawyers, however, is that they should aggressively seek possible proactive actions and actively assess the risks of such proactive actions. Merely that risk exists should not be sufficient to nullify action. If the potential benefits outweigh the risks then, in coordination with other pertinent actors and upon decision by commanders or other senior officials when appropriate, action should then be taken to pursue the proactive opportunity.

A more commonly accepted concept is that enemies use lawfare to constrain U.S. options. Placing voluntary or involuntary human shields near important targets and emplacing valuable military assets near places protected under the LOAC (e.g. near mosques) are common examples. Other examples include adversaries killing civilians near a U.S. strike and asserting that the civilian casualties were the result of the strike or captured enemy combatants making false allegations to the ICRC and others of abuse by U.S. and coalition troops. Brigadier General Dunlap observed in his seminal article that when an enemy during armed conflict employs lawfare the enemy generally is aiming to diminish the strength of U.S. and coalition allies' will and support for the military effort.⁷² Actual violations of the LOAC may not be necessary to have a detrimental effect – perceived violations if not successfully contested can have just as deleterious effects on U.S. and allied will to fight.

In addressing adversary-initiated lawfare, the strategic-level attorney must work aggressively to ensure that the correct legal analysis is deployed in the public domain. A predicate to successfully defending against this form of lawfare is ensuring that the command has an accurate understanding of the facts and has adequately documented them. Without a good understanding and documentation to back up that understanding, any lie can be made believable and good faith misunderstandings are much more likely. Assuming the command has a good grasp of the facts, the next step is ensuring effective communication of the facts and applicable law to the public and other interested parties. Ultimately, where groups “challenge a prudent command decision that involves civilians, well-prepared, thorough, fact-based

arguments should be made aggressively and swiftly to defend command action, to maintain the initiative, and prevent operational degradation.⁷³ This requires not only well-trained military attorneys, but well-trained public affairs officers, command spokespersons, and information operations officers. Strategic-level attorneys must ensure that these personnel are educated in the LOAC and application of the LOAC to the situation at issue so that precise, accurate, and pertinent information is provided. To defeat lawfare of this type, however, military attorneys also must convince command spokespersons that an aggressive public education campaign about what the LOAC requires is necessary.⁷⁴ Ultimately, military attorneys also may have to shed their normal reticence and be willing to engage the media themselves on behalf of their command.

The War on Terrorism, the War of Ideologies, and the Strategic Legal Advisor: Using Lawfare to our Advantage?

Our national strategies recognize that the war on terror is a war of ideas.⁷⁵ It is a clash of U.S. values being spread through globalization against the reactionary beliefs of radical Islamists who desire to replace this system with a radical Islamist world order. Such is inevitable given that the U.S. is a values-based country with a values-based government.⁷⁶ The NSS states that with America's current unprecedented strength and influence come unparalleled responsibilities and opportunities.⁷⁷ As the NSS states, U.S. strategic precepts are based on an American internationalism reflecting U.S. values combined with U.S. national interests in a globe that is increasingly united by common values and interests. That the war on terrorism is a war of ideas is frequently written about.⁷⁸ Henry Kissinger, former Secretary of State, for example, recently wrote that the phenomenon of radical Islam ". . . is an ideological outpouring by which Islam's radical wing seeks to sweep away secularism, pluralistic values and Western institutions wherever Muslims live."⁷⁹ Numerous analysts have emphasized the importance of ideas to defeat an ideology. For example, states one, Al Qaeda is an insurgency appealing to the Islamic world with the revolutionary vision of strict Islamist governments replacing current moderate or secular Islamic regimes. Accordingly, to win the war against terrorism the U.S. must offer more appealing opportunities than Al Qaeda does.⁸⁰ Since the U.S. possesses such great military and economic power, the U.S. is at a disadvantage in the war of ideas because its power is threatening. Fundamentally, to someone outside the U.S., the scope of the power of the U.S. makes it difficult to determine if the U.S. rhetoric of democracy and freedom is only that – rhetoric.⁸¹ Thus, it can be difficult to determine how the U.S. should undertake to win the war of ideas. While much attention has been paid to the impact of information operations or sometimes called strategic communications, the actual actions of the

U.S. also speak volumes.⁸² For example, a strong case can be made that the teachings of the radical Islamists are significantly strengthened by the large number of authoritarian regimes in the mostly Muslim countries of the world, U.S. support for those regimes, and the perception of the imbalance of global distribution of power as exemplified in recent U.S. actions.⁸³ One way that the U.S. can influence positively this war of ideology is by its choices relating to the international order. Examination of the U.S. policy regarding the Rome Statute of the International Criminal Court (Statute) – the U.S. is not a party – is exemplary.

The International Criminal Court (ICC) is a permanent, treaty-based criminal court with international jurisdiction. It was established by the Statute on 17 July 1998 and went into force, under the Statute's terms, on 1 July 2002.⁸⁴ Unlike the existing International Criminal Tribunals for Yugoslavia and Rwanda (ICTY and ICTR, respectively) which are ad hoc organizations established within the framework of the United Nations (UN), the ICC is independent of the UN.⁸⁵

State Parties to the Statute and the UN Security Council may refer situations to the ICC for investigation. Absent referral, the ICC prosecutor may initiate an investigation based on reliable information. Under this circumstance the prosecutor must obtain judicial review and approval by two judges of a three-judge panel before issuing a warrant for the arrest of a person. The Statute also establishes the Assembly of States Parties, composed of all parties to the Statute, to provide oversight to the Court.⁸⁶ The ICC has jurisdiction over all crimes (recognized under the Statute) that occur in a territory of a state party or committed by a national of a state party.⁸⁷ Thus, the ICC has jurisdiction over accused nationals from nations that are not parties to the Rome Statute if the alleged crime occurs in the territory of a state party. By the terms of the Statute, the ICC will investigate and prosecute only if a state is unwilling or unable to effectively prosecute. Under Article 98 of the Rome Statute, the ICC may not request the surrender of a person if doing so would require the requested state to violate an international agreement.⁸⁸

The U.S. participated in the development of the Rome Statute from the beginning. President Clinton signed the treaty on 31 December 2000, but, ultimately, in a letter to the UN dated 6 May 2002 the U.S. formally notified the UN that the U.S. did not intend to become a party to the Rome Statute.⁸⁹ The U.S. decision to not become a party to the Statute is based on several "fundamental flaws."⁹⁰ Ultimately, the U.S. contends that accountability for war crimes should be obtained primarily by relying on national judicial systems and international tribunals appropriately established by the Security Council within the UN framework.⁹¹ Current U.S. policy is to not become a party to the ICC and to continue to maintain objections to the ICC,

because the ICC's jurisdiction over non-party state nationals "strikes at the essence of the nature of sovereignty."⁹² Additionally, U.S. policy mandates that U.S. military members must be protected from prosecution before the ICC absent consent from the U.S. or a referral from the UN Security Council.⁹³

Responding to significant concerns about the Rome Statute and the ICC, the U.S. Congress passed the American Service Members' Protection Act (ASPA) as part of the 2002 Emergency Supplemental Appropriations Act. The ASPA, among other things, prohibits U.S. military assistance to countries that have not signed Article 98 agreements. Countries that are not a party to the Rome Statute are not affected by the ASPA.⁹⁴

The U.S. decision not to become a party to the Rome Statute runs counter to the National Security Strategy's approach of cooperative action and sustaining common principles. Failure to become a party is inconsistent with the National Defense Strategy's conclusion that international partnerships are "a principal source" of U.S. strength.⁹⁵ Additionally, non-membership is contrary to the NDS objectives of "strengthen[ing] alliances and partnerships," and establishing conditions "conducive to a favorable international system."⁹⁶ Non-participation results in the U.S. failing to lead a growing international body – failing to exploit a U.S. strength. Additionally, at face value the U.S. policy runs counter to the NSS goal of respect for human dignity, including championing justice and the rule of law.⁹⁷ Finally, non-participation opens the U.S. to international criticism as "unilateralist," hypocritical for decrying war crimes but then acting parochially to protect its nationals, and for engaging in "bullying" diplomacy by pushing for Article 98 agreements to protect U.S. military.⁹⁸ As the war on terrorism is a war of ideologies the U.S. must make a significant effort, if not its main effort, in convincing moderate Muslims that Western liberal democratic institutions, ideals, and values provide a better future than radical Islamism. If this is the case, the U.S. must act consistently from a values basis. That is, the U.S. cannot appear to act hypocritically or parochially. Anything that adversely affects perceptions about the U.S. goals in the war on terrorism will weaken U.S. global legitimacy, and, therefore, adversely affects the ability of the U.S. to successfully prosecute the war on terrorism.⁹⁹ In short, not being a party to the Rome Statute is a strategic mistake in the war on terrorism.

The NSS and the NDS explicitly and implicitly state that the U.S. has the right to act outside of a coalition or international organization to defend against a sufficient threat to U.S. national security.¹⁰⁰ The authority and necessity to use preemptive or preventive war to defend the U.S. does not negate the inconsistency between the national strategies and the current U.S. policy towards the ICC. Although the NSS and NDS display a willingness to "go it alone" they

clearly and repetitively articulate that “going with others” is the preferred course. Additionally, the NDS identifies that the U.S. will be challenged by the use of “international fora, judicial processes, and terrorism.”¹⁰¹ This statement recognizes the reality of terrorist tactics. If anything, if terrorists are using “judicial processes” and “international fora” against the U.S., the U.S. ought to not absent itself from this part of the theater strategic environment of the war on terrorism.¹⁰² As long as the U.S. is not a party to the ICC, it will have great difficulty in influencing ICC rules, policies, or application.

Thus, in light of national strategy and best practices in prosecuting the war on terror, the U.S. should consider revoking its non-party notification and becoming a party to the Rome Statute invoking Article 124 of the Statute. Article 124 states that a state on becoming a party to the Statute may declare that for seven years after the entry into force of the Statute for that state that state does not accept the jurisdiction of the ICC for crimes committed by its nationals.¹⁰³ Under Article 127, a State may withdraw from the Statute after written notification and a delay of one year.¹⁰⁴ Thus, the U.S. would become a party but would not have any risk of prosecution of U.S. nationals for seven years from becoming a party.¹⁰⁵ During that seven year period the U.S. could work to make necessary changes to the Statute and obtain sufficient support from Congress for modification of the ASPA. If at the end of six years this had not been accomplished, the U.S. could notify of its withdrawal and have not suffered from any of its fundamental concerns about the ICC. The United States would receive significant credit internationally for adopting this policy and this course supports the NSS and NDS and prosecution of the war on terror.

This one example demonstrates how what may be considered a legal issue can be of strategic concern and how lawyers at the strategic level need to address legal issues in terms of national security strategy. U.S. military attorneys must always be cognizant that advice on the law and legal issues may move the United States closer to, or farther away from, realizing national strategic goals. Military lawyers must look not only to narrow legal issues but also to the impact of how those issues are addressed to assure that legal, moral, and strategically enhancing decisions are reached. Furthermore, strategic leaders must be attuned to the strategic impact that decisions on legal issues may have.

Military Legal Advisor Capabilities

Military attorneys at the strategic level must work to address, defensively and proactively, the increase in legal issues impacting military operations and implementation of national strategy. Thus, military lawyers must react effectively to lawfare, be proactive, and consider

how decisions within a legal context can be used to support the national security strategy (while remaining legally, ethically, and morally sound). Military lawyers because of training and experience, however, can also provide practical judgment on almost any issue. At the strategic level, the common-sense and sharp analysis that lawyers bring to the table should be fully utilized.

For most lawyers, legal education begins in law school. Despite what many non-lawyers think, legal education does not teach students law. This is because “law” is not a finite thing that can be learned. Although law students certainly read cases, statutes, administrative rules, etc., law students soon find that “law is rarely bounded, is often ambiguous, and sometimes practiced in great variance from how it is written.”¹⁰⁶ Thus, law students are taught the process by which law is created, why laws are made and how they evolve, values and ethics, research skills, and managing interpersonal relationships, among other things. An effective lawyer must be able to creatively handle novel situations because, in general, no two situations confronting a professional are ever precisely the same. Law schools, therefore, exist to prepare students to be effective practitioners of the legal profession – which requires law schools to teach their students “how to think like a lawyer.”¹⁰⁷ Thus, a legal professional not only must be well versed in the field of law, but must be able to exercise appropriate practical judgment while drawing on that knowledge in succeeding unique circumstances.¹⁰⁸

Among the many characteristics required of good lawyers, good practical judgment is the “key faculty needed when lawyers seek to identify, assess, and propose concrete solutions in particular and often complex social circumstances.”¹⁰⁹ Legal education contributes to developing practical judgment in a variety of ways, for example, through the casebook methodology of teaching the law¹¹⁰ and the use of the Socratic teaching method.¹¹¹ Practical judgment is a combination of sound deliberation -- including exercising the intellect and considering moral values -- and prudent decision leading to action.¹¹² Thus, good lawyers are able to see the whole situation, the forest and the trees at the same time, so to speak, taking into account opposing and varied perspectives simultaneously, and being able to articulate likely viewpoints and concerns of multiple participants in a process.¹¹³ Judgment, for lawyers, means to “invoke and apply knowledge responsively when there are competing concerns and discrete decisions” that need to be made.¹¹⁴

Once a student leaves law school and becomes an attorney, the requirement to apply judgment while drawing on the knowledge of the law only increases. One could argue that for senior military attorneys the exercise of practical judgment within a legal context is their primary activity. The ever-present need for lawyers to apply practical judgment is so widely understood

within the legal profession that the legal rules of ethics formally endorse lawyers contemplating nonlegal considerations on behalf of their clients. The Army Rules of Professional Conduct for Lawyers, for example, states in Rule 2.1 that: “. . . a lawyer shall exercise independent professional judgment and render candid legal advice. In rendering advice a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant. . . .”¹¹⁵ The commentary to Rule 2.1 states, among other things, that narrow legal advice may be of little value, especially where “practical considerations, such as cost or effects on other people, are predominant.”¹¹⁶ In addition to the strictures of Rule 2.1, Army legal ethics require Army attorneys to consider the impacts of actions on the legal system and quality of justice.¹¹⁷ Legal scholars generally agree that non-legal counseling should be encouraged – it is not only permissible, but desirable in certain circumstances.¹¹⁸ Additionally, as a practical matter given the growing complexity of life, lawyers are increasingly required to provide advice on issues that would not be considered legal by traditional standards.¹¹⁹

Thus, through education, training, and life-long experience, lawyers become experts at analyzing facts and issues from a great mass of data, determining the import of this information, applying good practical judgment including consideration of non-legal factors, and ultimately, synthesizing and articulating this information in a helpful way within the context of the law.

The Strategic Lawyer and Candid Military Legal Advice Referring to “Moral, Economic, Social, and Political Factors”

With the nation in a long-term war on terrorism, it is increasingly important that all tools in the arsenal are used to the fullest effectiveness. Use of military lawyers’ practical judgment – particularly at the strategic level – is a significant tool in this war. In this war of ideologies – at its most simple articulation, democracy against radical, fundamentalist Islamism – the law, lawyers and good judgment are crucial. Commanders’ decisions must be considered in light of legal considerations to ensure that the enemy is not given ammunition to destroy the will of the people (defensive lawfare). Furthermore, legal decisions must be considered in light of national strategy to ensure that they support that strategy (offensive lawfare). Additionally, to win the war on terrorism – a war of ideologies – military decisions must be sound and derive from U.S. values. While it is recognized that the fundamental values of American society are consistent with the role of the American military professional,¹²⁰ military adherence to and spreading of the fundamental values of American society also are necessary to win the war on terrorism. Fundamentally, every time that the actions of the U.S. and its military are seen as incompatible with the values we espouse, we hand radical Islamism a round of ammunition.

An example of how lawyers' excellence in practical judgment can be used to further sound decision-making and adherence to American values occurs in Irving Janis' studies into the group decision-making failure he termed "groupthink." Janis introduced the concept of groupthink in his 1972 article titled "Groupthink: the Desperate Drive for Consensus at Any Cost."¹²¹ In this article Janis argued that significant policy decisions that were fiascos were the result of a group dynamic that he called "groupthink." In particular, Janis used as his example the decision by President Kennedy to authorize the Bay of Pigs operation, noting that the lack of intelligence of the decision-maker and his advisors was not the cause for this notably bad decision.¹²² Janis noted that one of the "key characteristics of groupthink" is that members of the group remain loyal to the group by sticking to the policies to which the group has already committed itself.¹²³ Groupthink arises among groups in which the members avoid being too harsh in their judgments of their leaders' or colleagues' ideas – the members adopt a "soft line" of criticism.¹²⁴ Thus, although pressure from within the group to conform to the group's consensus is not unknown, self-censorship of thought is more prevalent. In groupthink, when addressing personal, lingering uncertainties the members tend to give the benefit of the doubt to the group consensus. Groupthink tends to increase, he stated, as group cohesiveness increases because: "[i]n a cohesive group, the danger is not so much that each individual will fail to reveal his objections to what the others propose but that he will think the proposal is a good one, without attempting to carry out a careful, critical scrutiny of the pros and cons of the alternatives."¹²⁵ Group members participating in a group of respected colleagues, Janis analyzed, can fall into consensual validation of beliefs, vice individual, personal critical thinking. Thus, in a remarkably counter-intuitive manner, high group cohesion can work against a group and be a negative factor to making good decisions. Groupthink occurs, Janis stated, as a "mutual effort among the group members to maintain self-esteem and emotional equanimity by providing social support to each other" especially at times of decision-making under stress.¹²⁶ Since his initial article was published, the concept of groupthink has grown in popularity, becoming a "standard item in textbooks in social psychology, organization and management, and public policy-making."¹²⁷

Janis prescribed remedies for the groupthink trap. Groups "whose members have properly defined roles, with traditions concerning the procedures to follow in pursuing a critical inquiry" probably make better decisions than any lone decision-maker.¹²⁸ Thus, policy leaders should stress that each member of a policy-forming group should act as a "critical evaluator"; experts and evaluation groups outside the policy-making group should work on the same policy issues and challenge views of the core group; all members should be encouraged to air any

residual doubts; and, finally, whenever an evaluation of policy alternatives is required, “at least one member should play devil’s advocate, functioning as a good lawyer in challenging . . . those who advocate the majority opinion.”¹²⁹

Senior military lawyers, through education, training and experience, are an excellent choice to mitigate groupthink during decision-making at the strategic level -- acting as Janis’ “devil’s advocate” and as a “good lawyer” to challenge the majority position.¹³⁰ Lawyers’ lack of specific information relevant to the group’s decision under review does not detract from their capability to perform this role. Groups are frequently formed from those who know about the problem and the group members are expected to bring problem-specific expertise, information, and analysis to the group’s problem-solving process. Groupthink can be mitigated, however, by the participation of members from outside the group or by having a participant responsible for challenging the majority position. A lawyer with little or no knowledge of the specific issue under discussion, because of training and experience can fulfill the role of majority challenger. A senior military attorney is educated and trained to ask the right questions, rapidly assess and assimilate facts, consider their import, and articulate positions, with the expectation that non-legal concerns will be integrated into the analysis.

Pulling it all Together – the Role of Strategic Legal Advisor

It is a given that senior military attorneys operating at the strategic level will understand the legal implications and will provide the advice necessary to avoid violations of the law. It must be recognized, however, that at the strategic level often the law is at its most flexible – that is, the law is most malleable. In short, at the strategic level there is the greatest capability to shape the law to meet the commander’s needs. For example, the senior attorneys’ direct clients may be the writers of the regulations under interpretation. Modification of the regulation is a very real possibility, as versus a remote and time-consuming possibility to an attorney in the field. Similarly, access to the Congressional legislative cycle is significantly greater at the strategic level and attempting to change a troublesome statute is always an option that should be considered. Finally, “precedential” interpretations or policies that drive field attorneys’ opinions are published at the strategic level. Thus, an attorney at the strategic level must always consider how the law can be shaped or how interpretations can be changed as a possible answer to an issue with legal concerns.

In making the analysis of how the law can be shaped, the attorney must be encouraged to consider the effect and provide advice on the strategic and policy implications of the interpretations of or possible changes to the current law. All too often, clients of senior

attorneys are interested in what the law says and what the law permits or prohibits – not often enough in the possible or likely results of interpreting the law to permit or prohibit the activity in question or considering whether taking the time or effort to change (or obtain an exception to) the law is a better course of action.¹³¹ Experienced lawyers, through training and experience, are expert information synthesizers. Additionally, lawyers are ethically required to exercise independent judgment and in doing so consider more than just the law. Thus, attorneys can take information from disparate substantive disciplines, make useful correlations, and reach useful conclusions.

Ultimately, military attorneys at the strategic level must view legal action and advice as a weapon of warfare. Given our Nation's current long-term struggle against terrorism, our national strategies for security, and the skills that military attorneys bring to the table, senior military attorneys must be prepared and encouraged to respond to attacks that use law as the weapon; think about how the U.S. can actively use legal actions to win the war on terrorism; and use their training and experience in synthetic thinking to assist commanders to make sound policy decisions.

Recommendations

Army doctrine fails to address adequately the role of the strategic legal advisor. It is a well-known fact that many senior military attorneys and Staff Judge Advocates have had and currently have excellent personal relationships with commanders and clients and that once a solid relationship is developed discussions become far ranging and cover a breadth of topics. This oral tradition needs to be formally addressed in doctrine. Doctrine should also address the use of judge advocates at all levels as “devil’s advocates.” Formal recognition of this role in doctrine would enhance the capability of judge advocates to perform this role. Additionally, the increasing importance of law as a weapon of warfare – particularly in the war on terrorism – needs to be addressed. Doctrine should recognize the significant importance that legal decisions can have on the strategic situation and direct military lawyers to address policy implications of otherwise legal courses of action. FM 27-100, therefore, should be reviewed and changes incorporated to address comprehensively the role of military lawyers at the strategic level and the expanded spectrum of legal advice needed at all levels to more effectively fight the war on terrorism.

Additionally, the military legal establishment, both at DoD and Service levels, should consider establishing a joint legal office at the national level responsible for analyzing legal trends and issues, making recommendations to senior legal personnel responsible for advising

strategic leaders, and working to keep the larger legal community informed of these trends and the ongoing analysis. This organization would be chartered to recognize legal threats and propose responses – with a constant view towards their impact on strategic operations. Additionally, this office would provide advice on how to address recurrent issues (e.g. common targeting issues) and be responsible for publishing articles and information throughout the military legal community.

Endnotes

¹ David Zucchino, *Thunder Run* (New York: Atlantic Monthly Press, 2004), 285.

² Zucchino, 294 – 295.

³ Ibid., 295.

⁴ Ibid., 296.

⁵ Ibid. When the Task Force 4-64 soldiers fired, they did not know that they were firing into the Palestine Hotel.

⁶ Joel Campagna and Rhonda Roumani, “Permission to Fire,” 27 May 2003; available from http://www.cpj.org/Briefings/2003/palestine_hotel/palestine_hotel.html; Internet; accessed 3 February 2006.

⁷ Zucchino, 297 – 98.

⁸ “Powell Letter: ‘Force was Justified,’” *The New York Times*, 25 April 2003, pg. A13 [database on-line]; available from ProQuest; accessed 3 February 2006.

⁹ Tito Drago, “Spain: U.S. Soldiers to be Tried for Reporter’s Death in Iraq,” *Global Information Network*, 20 October 2003, pg. 1, [database on-line], available from ProQuest; accessed 3 February 2006.

¹⁰ “Killing the Witness: Spanish Judge Orders Arrest & Extradition of U.S. Soldiers in Death of Spanish Journalist Jose Couso in Iraq,” 20 October 2005, available from <http://www.democracynow.org/article.pl?sid=05/10/20/1410259>; Internet; accessed 3 February 2006.

¹¹ “Spanish Judge Orders Arrest of U.S. Soldiers Cleared in 2003,” 20 October 2005, available from <http://usinfo.state.gov/eur/Archive/2005/Oct/20-448501.html>; Internet; accessed 3 February 2006.

¹² “U.S. Ambassador ‘Respects’ Judge’s Demand for Extradition,” *The Spain Herald*, 21 October 2005, available from <http://www.spainherald.com/1797.html>; Internet; accessed 3 February 2006.

¹³ Ibid.

¹⁴ See, e.g., U.S. Department of the Army, *Operations*, Field Manual 3-0 (Washington, D.C.: U.S. Department of the Army, 14 June 2001), 2-2.

¹⁵ Ibid.

¹⁶ Colin S. Gray, *Modern Strategy* (Oxford: Oxford University Press, 1999), 17. This definition is comparable to that of the famous military theorist, Carl von Clausewitz, who defined strategy as “the use of engagements for the object of the war.” I note that Clausewitz wrote at a time when war was intensely personal, when commanders could – for perhaps the last time – see all the troops under their command during battle, when effective weapon ranges were less than what a car can drive on the highway in one minute, and when operational plans were constrained by the distance man and animal carrying a load could march in one day. Clausewitz could not envision the destructiveness of today’s weapons; the ability of twenty men to kill over 3,000 civilians in a few minutes time, the shrinking of time and space, and the increasingly phenomenal ability to communicate across distance and to multiple persons. Nonetheless, he wrote about war in a way that is still relevant. He provides insights that are still worth considering. I agree with Gray that Clausewitz is unique among military theorists because of the breadth, quality, and quantity of his insights.

¹⁷ H. Richard Yarger, “Toward a Theory of Strategy: Art Lykke and the Army War College Strategy Model,” in *Theory of War and Strategy*, Volume I, ed. James A. Helis (Carlisle Barracks: U.S. Army War College, 2005), 3. Under joint doctrine, a national security strategy is the “art and science of developing, applying, and coordinating the instruments of national power . . . to achieve objectives that contribute to national security.” Joint Chiefs of Staff, *Unified Action Armed Forces*, Joint Publication 0-2 (Washington, D.C.: U.S. Joint Chiefs of Staff, 2001), I-2 – I-3.

¹⁸ Ibid.

¹⁹ U.S. Department of the Army, *Operations*, 2-3.

²⁰ Joint Chiefs of Staff, *Doctrine for Joint Operations*, Joint Publication 3-0 (Washington, D.C.: Joint Chiefs of Staff, 2001), I-6, II-2. The President exercises his Constitutional authority as commander-in-chief to direct the U.S. Armed Forces. The Secretary of Defense, heading the Department of Defense, is responsible to the President for creating, supporting and employing military capabilities. The Department of Defense is a Cabinet-level Organization with three military departments, four armed services, seven field activities, sixteen defense agencies, and nine combatant commands reporting directly to it. The four armed services are subordinate to their military departments. The armed services are responsible for recruiting, training and equipping their forces; operational control of those forces is assigned to one of the combatant commands. Defense Almanac, linked from the *Department of Defense Home Page*, available from <http://www.defenselink.mil/pubs/almanac/>; Internet; accessed 9 December 2005. The President and the Secretary of Defense exercise their authority over the armed forces communicating through the Chairman, Joint Chiefs of Staff through the combatant commanders, Secretaries of the Military Departments and the Service Chiefs. Joint Chiefs of Staff, *Unified Action Armed Forces*, I-1 – I-5.

²¹ U.S. Department of the Army, *Operations*, 2-3. Campaigns are the related series of military operations aimed at accomplishing strategic or operational objectives.

²² A review of the PP&TO personnel book demonstrates that there are Army personnel at almost all of these strategic-level organizations. U.S. Department of the Army, *JAGC Personnel and Activity Directory and Personnel Policies*, JAG PUB 1-1, (Washington, D.C.: U.S. Department of the Army, 1 October 2005). A Staff Judge Advocate is a member of the commander's personal staff. As such, the Staff Judge Advocate works under the immediate control of, and has direct access to the commander. A Staff Judge Advocate also works under the supervision of the Chief of Staff as a member of the special staff to provide legal services to the staff and throughout the command. U.S. Department of the Army, *Mission Command: Command and Control of Army Forces*, Field Manual 6-0 (Washington, D.C.: U.S. Department of the Army, 11 August 2003), figures C-2, D-46.

²³ U.S. Department of the Army, *Legal Support to Operations*, Field Manual 27-100 (Washington, D.C.: U.S. Department of the Army, 1 March 2000), vii.

²⁴ Ibid., viii. In general, some elements of all the core legal disciplines are present in each of the legal functional areas.

²⁵ Ibid., 1-1.

²⁶ Ibid., 1-8.

²⁷ Ibid.

²⁸ For purposes of this article, the "war on terrorism" is used to describe all military operations aimed at defeating terrorist groups – those who employ the calculated use of unlawful violence or threat of unlawful violence to inculcate fear with the intent to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious or ideological. See, Chairman, Joint Chiefs of Staff, *National Military Strategic Plan for the War on Terrorism* (Washington, D.C.: U.S. Joint Chiefs of Staff, February, 2006), 37.

²⁹ U.S. Department of the Army, *Rules of Professional Conduct for Lawyers*, Army Regulation 27-26, (Washington, D.C.: U.S. Department of the Army, 1 May 1992), 19. This regulation provides comprehensive rules governing the ethical conduct of Army lawyers. See fn. 115 and accompanying text for discussion of lawyers' ethical responsibilities to render legal advice tempered by practical judgment.

³⁰ See, e.g., Adam Roberts, "Law and the Use of Force After Iraq," *Survival* 45, no. 2 (2003): 34.

³¹ DoD policy and joint doctrine establish that legal support is to be pervasive throughout the length and breadth of military operations. All operations plans and orders, rules of engagement, and policies and directives must receive legal review to ensure compliance with domestic and international law and the DoD Law of War program. Also, legal advisers are required to provide advice addressing law of war compliance, including legal constraints on operations and legal rights to use force. Joint Chiefs of Staff, *Implementation of the DoD Law of War Program*, Chairman of the Joint Chiefs of Staff Instruction 5810.01B (Washington, D.C.: Joint Chiefs of Staff, 2002), 2, A-3. Some have criticized the integral relationship between lawyers and operations. See, e.g., Harvey M. Sapolsky, "War Needs a Warning Label," *Breakthroughs* 12, no. 1 (2003): 3 ("It's getting so that the American military does not even loads (sic) its weapons these days without consulting its lawyers.").

³² See, generally, John F. Murphy, *The United States and the Rule of Law in International Affairs* (New York: Cambridge University Press, 2004) (a dramatic increase in the scope of issues in international law since World War II driven by economic, regulatory and social globalization); Donald H. Rumsfeld, *Quadrennial Defense Review Report*, (Washington, D.C.: Department of Defense, February, 2006), 24 (“Globalization enables many positive developments such as the free movements of capital, goods, and services, information, people and technology, but it is also accelerating the transmission of disease, the transfer of advanced weapons, the spread of extremist ideologies, the movement of terrorists and the vulnerability of major economic segments.”).

³³ George Bush, *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, September 2002), 1.

³⁴ Ibid., 3.

³⁵ Ibid., 1-2.

³⁶ Ibid., 28.

³⁷ Donald H. Rumsfeld, *The National Defense Strategy of the United States of America*, (Washington, D.C.: Department of Defense, March 2005), 1. The National Defense Strategy outlines the Secretary of Defense's approach to addressing likely Department of Defense challenges. Ibid., iii.

³⁸ Ibid., 4-5.

³⁹ Ibid., 6-7.

⁴⁰ Ibid., iv.

⁴¹ Ibid., 1.

⁴² Ibid., 4-5, 7.

⁴³ Ibid., 18-19. (“Many of the current legal arrangements that govern overseas posture date from an earlier era. Today, challenges are more diverse and complex, our prospective contingencies are more widely dispersed, and our international partners are more numerous. International agreements relevant to our posture must reflect these circumstances and support greater operational flexibility. They must help, not hinder, the rapid deployment and employment of U.S. and coalition forces worldwide in a crisis. Consistent with our partners’ sovereign considerations, we will seek new legal arrangements that maximize our freedom to: deploy our forces as needed; conduct essential training with partners in the host nation; and, support deployed forces around the world. Finally, legal arrangements should encourage responsibility-sharing between us and our partners, and provide legal protections for our personnel through Status of Forces Agreements and protections against transfers of U.S. personnel to the International Criminal Court.”)

⁴⁴ Donald H. Rumsfeld, *Quadrennial Defense Review Report*, 23. The QDR is not a programmatic or budget document. Ibid., vi. The QDR “represents a snapshot in time of the

Department's strategy for defense of the Nation and the capabilities needed to effectively execute that defense." *Ibid.*, ix.

⁴⁵ Brigadier General Dunlap is currently serving as the Staff Judge Advocate, Headquarters, Air Combat Command, U.S. Air Force. Biography, Brigadier General Charles J. Dunlap, February 2003, linked from the *Air Combat Command Home Page* at "Bios," available from http://www.af.mil/bios/bio_print.asp?bioID=5293&page=1; Internet; accessed 13 January 2006.

⁴⁶ Brigadier General Charles J. Dunlap, Jr., "Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflict," prepared for the *Humanitarian Challenges in Military Intervention* conference, Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University, (Washington, D.C., 29 November 2001), 5 [on-file with author]. Brigadier General Dunlap states that the term "lawfare" first appeared in a 1975 article. *Ibid.*, fn. 5. Given the length of time since the term was first used in 1975 and the exhaustive nature of Brigadier General Dunlap's 2001 paper it is appropriate that he be credited as the "father" of the modern use of the term.

⁴⁷ Modern Law of Armed Conflict is generally considered to have its inception in the 1863 "Lieber Code." The Lieber Code, named after its author Dr. Francis Lieber, was published as U.S. War Department, General Orders No. 100, Instructions for the Government of the Armies of the United States in the Field, 24 April, 1863, during the American Civil War. Analysis of the LOAC continued for the next half century, culminating in the Hague Conventions of 1899 and 1907 relating to the conduct of warfare on land, sea, and air (with a nod of admiration for the long-running television show *Jeopardy* – LOAC trivia for 1000 points: What did the Hague Conventions have to say about air warfare? Hague Declarations IV and XIV, ratified by very few states, addressed launching projectiles and explosives from balloons). The original Geneva Convention, relating to the treatment of wounded in the field, was adopted in 1864, revised and replaced in 1906 and 1929 and then, after the trauma of World War II, completely superseded by four Geneva Conventions in 1949. These Conventions address the wounded and sick in the field (Convention I), wounded and sick at sea (Convention II), prisoners of war (Convention III), and protection of non-combatants (Convention IV). The Cold War made further change or addition to the codified LOAC more difficult, but in 1977 the Additional Protocols 1 and 2 to the Geneva Conventions (Protocols) were codified. Protocol I addresses international armed conflicts and Protocol II non-international armed conflicts. The U.S. has not ratified the Protocols; it recognizes and conforms to the Protocols to the extent they represent customary international law. These various documents form the core of the LOAC. There are, however, numerous other treaties regulating hostilities. Many address weapons or weapon use. Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), 9 – 12.

⁴⁸ Specific examples would include using civilians as involuntary or voluntary "human shields" of legitimate military targets and placing military assets in otherwise noncombatant facilities (e.g. churches, hospitals). Dunlap, 13.

⁴⁹ *Ibid.*, 13-14. The RTS was the state-run media station in central Belgrade and was used as a tool for propaganda dissemination. The airstrike resulted in the death of 16 people and injuring of 16 more. Human Rights Watch criticized the strike as violative of the Law of Armed Conflict because the strike did not directly contribute to the military operation and because the risks to noncombatants greatly outweighed any military benefit. The ICTY accepted NATO's defense of the airstrike based on RTS broadcast of military communications, but observed in its

decision that a broadcast station being used merely for propaganda purposes would unlikely be a legitimate military objective. *Ibid.*, 14, *citing Bankovic and others v. 17 NATO States*, Application No. 52207/99 European Court of Human Rights, *Pending Cases Before a Grand Chamber*, accessible at <http://www.echr.coe.int/BilingualDocuments/PendCase.htm>; Internet, accessed 25 November 2001. See, also, Jefferson D. Reynolds, "Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground," *The Air Force Law Review* 56 (Summer 2005): 65.

⁵⁰ Dunlap, 6.

⁵¹ "The Pentagon and 'Lawfare,'" *The Washington Times*, 24 March 2005, [newspaper on-line]; available from <http://www.washingtontimes.com/functions>; Internet; accessed 27 September 2005.

⁵² Jeremy Rabkin, "Lawfare," *OpinionJournal*, 17 July 2004 [newspaper on-line]; available from <http://www.opinionjournal.com>; Internet; accessed 27 September 2005.

⁵³ Council on Foreign Relations, "Lawfare, the Latest in Asymmetries," 18 March 2003; available from <http://www.cfr.org/publication.html?id=5772>; accessed 28 October 2005.

⁵⁴ *Ibid.*

⁵⁵ Council on Foreign Relations, "Lawfare, the Latest in Asymmetries – Part Two," 22 May 2003; available from http://www.cfr.org/publication/6191/lawfare_the_latest_asymmetries_part_two.html. See, also, David B. Rivkin, Jr. and Lee A. Casey, "Friend or Foe?" *Wall Street Journal*, 11 April 2005, [database on-line]; available from ProQuest; accessed 4 November 2005 (ICRC "has become the leading practitioner of 'lawfare' – a form of asymmetrical warfare that aims to constrain American power using the law").

⁵⁶ An example frequently cited of collective action attempting to limit a great power is the creation of the International Criminal Court (ICC) under the Rome Statute of the International Criminal Court and international pressure for the U.S. to become a party. See footnote 84 and succeeding and accompanying text for a discussion of the ICC and argument for U.S. participation in the ICC as supportive of the war on terrorism despite concerns about politically motivated prosecutions of U.S. servicemembers.

⁵⁷ Keir A. Lieber and Gerard Alexander, "Waiting for Balancing," *International Security*, 30 (Summer, 2005): 111. There are many variations on this theory, including, among others, that states balance only against perceived threats and that geography qualifies balancing theory (e.g. the United States separated by two oceans from other possible great powers). *Ibid.*, 111 – 112.

⁵⁸ Robert A. Pape, "Soft Balancing Against the United States," *International Security*, 30 (Summer 2005): 9.

⁵⁹ Compare e.g. Pape, *ibid.*, 36 – 38 (Bismarck created "web of international cooperation" to isolate and balance France's power by removing capabilities available to France), with Lieber and Alexander, *ibid.*, 130 – 132 ("routine diplomatic friction" and "diplomatic maneuvering by U.S. allies and nonaligned countries against the United States in international institutions").

⁶⁰ See, John O'Sullivan, "The Reluctant Empire," *National Review*, 19 May 2003; [database on-line]; available from ProQuest; accessed 13 January 2005 for a discussion of the U.S. as global hegemon ("The U.S. is, of course, militarily stronger than any previous power, whether imperial or national. It also has a greater share of the world's productive capacity than any previous "hegemon." And its dominance in everything from technology to popular culture dwarfs the combined efforts of most other major nations. All these forms of superiority would enable it to get its way in most matters if it were determined to do so.").

⁶¹ Reynolds, 2.

⁶² Saposky, 4.

⁶³ Council on Foreign Relations, "Lawfare, the Latest in Asymmetries."

⁶⁴ Phillip Carter, "Legal Combat, Are Enemies Waging War in our Courts?" 4 April 2004; available from <http://slate.msn.com/toolbar>; Internet; accessed 27 September 2005.

⁶⁵ Donald H. Rumsfeld, *The National Defense Strategy of the United States*, 5.

⁶⁶ David Scheffer is the most articulate of several in making this argument. See, e.g., David Scheffer, "The Legal Double Standards of Bush's War," *Financial Times* (London, England)(6 May 2004) [database on-line]; available from Lexis-Nexis; accessed 4 November 2005.

⁶⁷ David J. Scheffer, "Review Essay: Delusions About Leadership, Terrorism, and War." *American Journal of International Law* 97 (January 2003): 211 [database on-line]; available from Lexis-Nexis; accessed 2 November 2005.

⁶⁸ David B. Rivkin and Lee A. Casey, "Friend or Foe," *The Wall Street Journal* (11 April 2005) [database on-line]; available from Proquest; accessed 4 November 2005. An example of this would be the ICRC efforts to impose through the LOAC a zero collateral damage approach.

⁶⁹ I gratefully acknowledge Lieutenant Colonel Thomas E. Ayres' contributions to my thoughts on this proposal. Thomas E. Ayres, "Six Floors' of Detainee Operations in the Post-9/11 World," *Parameters*, 35 (Autumn 2005): 39. For one of the first published uses of the term "unlawful combatant" in the context of the U.S. war on terror, see, George. W. Bush, "Humane Treatment of Al Qaeda and Taliban Detainees," 7 February, 2002; available from http://www.lawofwar.org/Bush_memo_Genevas.htm; Internet; accessed 3 February 2006. This memorandum states that captured Taliban fighters were unlawful combatants, and, therefore, did not qualify to be considered prisoners of war under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War. Al Qaeda operatives would not qualify as prisoners of war under the Geneva Conventions because the Geneva Convention Relative to the Treatment of Prisoners of War was not applicable to the conflict.

⁷⁰ One commentator asserts, for example, that U.S. detention of unlawful combatants at Guantanamo has resulted in: "angry foreign allies, a tarnishing of America's image, and declining cooperation in the Global War on Terrorism." Gerard P. Fogarty, "Is Guantanamo Bay Undermining the Global War on Terror?" *Parameters*, 35 (Winter 2005 – 06): 62.

⁷¹ Among other categories, captured personnel of a power that abides by the LOAC and who wear a uniform openly during combat are prisoners of war and accorded all privileges

specified in Geneva III. *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, available from <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68>; Internet; accessed 16 December 2005.

⁷² Dunlap, 11 – 12. Clausewitz stated that: “[w]ar is . . . an act of force to compel our enemy to do our will.” Clausewitz, in defining war, stated that to overcome an enemy the opponent must match his efforts to the opponent’s power of resistance, “which can be expressed as the product of two inseparable factors, viz. *the total means at his disposal* and *the strength of his will*.” Carl von Clausewitz, *On War*, trans. Michael Howard and Peter Paret (Princeton: Princeton University Press, 1976), 75, 92 – 93. Thus, if an enemy has a strong enough will the means at the enemy’s disposal can be very limited yet it will take significant effort to defeat that enemy.

⁷³ Reynolds, 108. Major Reynolds’ article presents several well-thought out and sound recommendations for addressing allegations of improper targeting, specifically, and lawfare in general.

⁷⁴ See, Reynolds, 104 – 05, fn. 409 for an example during Operation Iraqi Freedom of a missed opportunity to educate the public about the LOAC.

⁷⁵ See, Chairman, Joint Chiefs of Staff, *National Military Strategic Plan for the War on Terrorism*, 7 (the enemy’s “strategic center of gravity” is “extremist ideology”); Donald H. Rumsfeld, *Quadrennial Defense Review Report*, 22 (war on terrorist networks is “. . . both a battle of arms and a battle of ideas – a fight against terrorist networks and against their murderous ideology”); U.S. Department of Defense, *National Strategy for Combating Terrorism*, (Washington, D.C.: Department of Defense, February, 2003), 23.

⁷⁶ Anthony E. Hartle, *Moral Issues in Military Decision Making*, (Lawrence, Kansas: University Press of Kansas, 2004), 45 – 46, 132.

⁷⁷ George Bush, *The National Security Strategy of the United States of America*, 1.

⁷⁸ See, e.g., Zeyno Baran, “Fighting the War of Ideas,” *Foreign Affairs* 84 (November/December 2005): 68.

⁷⁹ Henry A. Kissinger, “How to Exit Iraq,” *Washington Post*, 18 December 2005, sec. B, p. 7.

⁸⁰ Michael F. Morris, “Al Qaeda as Insurgency,” *Joint Forces Quarterly*, no. 39 (Autumn 2005): 45.

⁸¹ James Page, “The U.S. is Suffering a Chronic Deficit of Legitimacy,” *New Statesman* 17 (2004): 34.

⁸² Baran, 76 (More and more muslims believe U.S. “freedom and democracy agenda’ is a trick”; U.S. strategy must stress “justice and dignity”).

⁸³ Mohammed Ayoob, “The Future of Political Islam: the Importance of External Variables,” *International Affairs* 81, no. 5 (2005): 960 – 61.

⁸⁴ "Assembly of States Parties" linked from the International Criminal Court Home Page at "Assembly of States Parties," available from <http://www.icc-cpi.int/asp/statesparties.html>; Internet; accessed 2 February 2006. As of 14 November 2005, 100 countries are state parties to the Rome Statute. The Rome Statute and ICC have an intellectual lineage dating back to the war crime tribunals occurring after World War II. Between 1949 and 1954, at the request of the UN, the UN International Law Commission prepared several draft statutes for an international criminal court. Work on the statute then ceased for 35 years. In 1989 the International Law Commission resumed work on draft statutes resulting in the adoption of the Statute in 1998. "Chronology of the International Criminal Court," linked from the International Criminal Court Home Page at "ICC at a Glance," available from <http://www.icc-cpi.int/about/ataglance/chronology.html>; Internet; accessed 28 November 2005.

⁸⁵ "Historical introduction," linked from the International Criminal Court Home Page at "ICC at a Glance," available from <http://www.icc-cpi.int/about/ataglance/history.html>; Internet; accessed 28 November 2005. The relationship between the UN and the ICC is established by a memorandum of agreement between those two organizations that went into effect on 4 October 2004.

⁸⁶ "How does the Court work?" linked from the International Criminal Court Home Page at "ICC at a Glance," available from <http://www.icc-cpi.int/about/ataglance/howdoesthecourtwork.html>; Internet; accessed 28 November 2005. Note that state parties are required to cooperate with ICC investigations.

⁸⁷ "Jurisdiction," linked from the International Criminal Court Home Page at "ICC at a Glance," available from <http://www.icc-cpi.int/about/ataglance/jurisdiction.html>; Internet; accessed 28 November, 2005. Crimes over which the ICC has jurisdiction are genocide, crimes against humanity, war crimes and aggression. The ICC will not exercise jurisdiction over the crime of aggression until the crime is adequately defined.

⁸⁸ "Rome Statute," linked from International Criminal Court Home Page at "About the Court," available from http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf; Internet; accessed 28 November 2005.

⁸⁹ Press Statement, "International Criminal Court: Letter to UN Secretary General Kofi Annan," 6 May 2002, linked from the U.S. Department of State Home Page at "Press Releases (other)," available from <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>; Internet; accessed 30 November 2005.

⁹⁰ Fact Sheet, "The International Criminal Court" linked from the U.S. Department of State Home Page at "Releases/Fact Sheets," 2 August 2002, available from <http://www.state.gov/t/pm/rls/fs/2002/23426.htm>; Internet; accessed 30 November 2005. In short, the U.S. position is that the jurisdiction of the ICC is too broad because the ICC has jurisdiction over nationals of non-party States – including U.S. service members. There are insufficient checks and balances over the power of the ICC prosecutor, who can proceed with investigation and prosecution merely with judicial review and approval. The ICC has too much discretion in determining whether a State is "unable or unwilling" to prosecute its national. The U.S. believes that these last two flaws create significant risk of politically motivated prosecutions. The U.S. is also concerned that State parties can opt out of jurisdiction of certain crimes – non-state parties cannot and that the ICC has jurisdiction over the crime of aggression, but the crime is not defined.

⁹¹ Fact Sheet ,“Frequently Asked Questions about the USG’s Policy Regarding the International Criminal Court,” 30 July 2003, linked from the U.S. Department of State Home Page at “Releases/Fact Sheets,” available from <http://www.state.gov/t/pm/rls/fs/23428.htm>; Internet; accessed 30 November 2005.

⁹² USUN Press Release, “Explanation of Vote by Ambassador Anne W. Patterson, Acting U.S. Representative to the United Nations, on the Sudan Accountability Resolution, in the Security Council,” linked from the United States Mission to the UN homepage at “Archives, USUN Press Releases,” 31 March 2005, available from http://www.usunnewyork.usmission.gov/arc05_1-3.htm; Internet; accessed 28 November 2005.

⁹³ Ibid.

⁹⁴ “American Servicemembers’ Protection Act” linked from the U.S. Department of State Home Page at “Releases/Other Releases,” available from <http://www.state.gov/t/pm/rls/othr/misc/23425.htm>; Internet; accessed 30 November 2005. If the foreign country is party to the Rome Statute and an agreement is not signed, the following types of assistance are suspended: International Military Education and Training (IMET), Foreign Military Financing (FMF), and Excess Defense Articles (EDA). Other types of aid, such as counternarcotics funding, is not affected. As of 3 May 2005, 100 countries had signed bilateral agreements with the United States under Article 98 of the Rome Statute. These agreements protect against the possibility of transfer or surrender of United States nationals to the ICC. Press Statement, “U.S. Signs 100th Article 98 Agreement,” 3 May 2005, linked from the U.S. Department of State Home Page at “Press Releases (other),” available from <http://www.state.gov/r/pa/prs/ps/2005/45573.htm>; Internet; accessed 30 November 2005.

⁹⁵ Donald H. Rumsfeld, *The National Defense Strategy of the United States of America*, 4 – 5.

⁹⁶ Ibid., 6 – 7.

⁹⁷ George Bush, *The National Security Strategy of the United States of America*, 3.

⁹⁸ Nicholas D. Kristoff, “Schoolyard Bully Justice,” 16 October 2005, linked from the Global Policy Forum Home Page at “International Justice,” available from <http://www.globalpolicy.org/intljustice/icc/2005/1016schoolyard.htm>; Internet; accessed 1 December 2005. Additionally, the ASPA’s limitations on security cooperation are hampering U.S. security cooperation efforts, particularly in South America. Juan Forero, “Bush’s Aid Cuts on Court Issue Roils Latin America,” 19 August 2005, linked from the Global Policy Forum Home Page at “International Justice,” available from <http://www.globalpolicy.org/intljustice/icc/2005/0819latinamerica.htm>; Internet; accessed 1 December 2005.

⁹⁹ See, e.g., Andrew Harvey, Ian Sullivan, and Ralph Groves, “A Clash of Systems: An Analytical Framework to Demystify the Radical Islamist Threat,” *Parameters* 35 (Autumn 2005): 73. From this viewpoint, it is important that the U.S. champion and demonstrate justice as well as freedom and democracy. George Perkovich, “Giving Justice its Due,” *Foreign Affairs* 84 (July/August 2005): 80.

¹⁰⁰ George Bush, *The National Security Strategy of the United States*, 6, 15; Donald H. Rumsfeld, *The National Defense Strategy of the United States*, 1-2.

¹⁰¹ Donald H. Rumsfeld, *The National Defense Strategy of the United States*, 5.

¹⁰² The “theater strategic environment” is the composite of the conditions, circumstances and influences in the theater that describes the diplomatic-military situation, affect the employment of military forces, and affect the decisions of the operational chain of command. Joint Chiefs of Staff, *DOD Dictionary of Military and Associated Terms*, Joint Publication 1-02 (Washington, D.C.: Joint Chiefs of Staff, 2001), 539.

¹⁰³ “The Rome Statute of the International Criminal Court,” linked from the International Criminal Court Home Page at “About the Court/Official Journal,” available from [http://www.un.org/law/icc/statute/english/rome_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf); Internet; accessed 5 December 2005. Article 124, “Transitional Provision,” states in pertinent part: “. . . a State, on becoming a party to this Statute, may declare that, for a period of seven years after entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court. . . .” Note that Article 126, “Entry into Force,” states that “[f]or each State ratifying, accepting, approving, or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month of the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval, or accession.”

¹⁰⁴ Ibid.

¹⁰⁵ Ibid. More precisely stated, seven years from 60 days after the U.S. gave notice of its acceptance. See footnote 33, above.

¹⁰⁶ Richard A. Matasar, “The Rise and Fall of American Legal Education,” *New York Law School Law Review* 49 (2004/2005): 467.

¹⁰⁷ D. Don Welch, “What’s Going On? In the Law School Curriculum,” *Houston Law Review* 41 (Spring, 2005): 1607.

¹⁰⁸ Ibid., 1611.

¹⁰⁹ Mark Neal Aronson, “We Ask You to Consider: Learning About Practical Judgment in Lawyering,” *Clinical Law Review* 4 (1998): 249.

¹¹⁰ Ibid., 1614 (Law school casebooks contain numerous cases from throughout U.S. jurisprudence. There is often little if any explanation contained in the casebook of the meaning of the case. That is left to the student to determine. Pertinent facts and court holdings are buried in large amounts of irrelevant or non-pertinent information. From personal experience, law school texts are thick, dense and dry reading. The student, however, learns from this experience to sort the important from the unimportant.)

¹¹¹ Ibid., 1616 (In general, under the Socractic method a law professor calls upon a student to recite the facts, issues, and holdings of a case. The questioning then moves beyond the case under review and the questions expand to application of the case to other hypotheticals. Although under significant attack as demeaning and demoralizing, the Socratic method does teach law students to analyze under stress the impact of changing circumstances.)

¹¹² Aronson, 256.

¹¹³ Ibid., 251 – 53.

¹¹⁴ Ibid., 264. Judgment encompasses qualities such as soundness, logic, discrimination, discernment, imagination, sympathy, detachment, impartiality, and integrity. Ibid., 273.

¹¹⁵ U.S. Department of the Army, *Rules of Professional Conduct for Lawyers*, 19. Pursuant to Rule 1.13, except when representing an individual client, an Army lawyer represents the Department of the Army. The American Bar Association's Model Rules of Professional Conduct, Rule 2.1 reads virtually identical to the Army's rule: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation."

¹¹⁶ Ibid.

¹¹⁷ Ibid., 3. Note that Army lawyers are ethically prescribed to owe allegiance not to any immediate group, but to the Army and justice.

¹¹⁸ Larry O. Natt Gantt, II, "More than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations," *Georgetown Journal of Legal Ethics* 18 (Spring, 2005): 367-69. (Nonlegal counseling should be encouraged, but standards on when, how much, and impact are unsettled).

¹¹⁹ Ibid., 365.

¹²⁰ Hartle, 150.

¹²¹ Irving L. Janis, "Groupthink: the Desperate Drive for Consensus at Any Cost," *Psychology Today*, 1971, reprinted in U.S. Army War College, *Selected Readings, AY2006, Strategic Leadership Course*, ed. Charles R. Oman (Carlisle Barracks: U.S. Army War College, 2005), 224. Janis followed this seminal work with several others, but he never deviated significantly from his analysis in this 1971 article. In 1972 Janis published *Victims of Groupthink: A Psychological Study of Foreign Policy Decisions and Fiascos*. In 1982, he expanded and refined his concept in *Groupthink: Psychological Studies of Policy Decisions and Fiascos*. In 1989 he used groupthink as a basis to analyze a theory of executive decision-making in *Crucial Decisions: Leadership in Policy-making and Crisis Management*.

¹²² Janis, 224. ("Stupidity certainly is not the explanation. The men who participated in the Bay of Pigs decision, for instance, comprised one of the greatest arrays of intellectual talent in the history of the American Government. . . .")

¹²³ Ibid., 225.

¹²⁴ Ibid.

¹²⁵ Ibid. (emphasis added).

¹²⁶ Ibid., 229.

¹²⁷ Paul 't Hart, Eric K. Stern, and Bengt Sundelius, eds., *Beyond Groupthink: Political Group Dynamics and Foreign Policy-making* (Ann Arbor, MI: The University of Michigan Press, 1997), 11 (analysis of the small group as a unit of decision in foreign policy has been mainly guided by Janis' work on groupthink, *ibid.*, 7). Note, however, that the groupthink model has been criticized on several grounds. It is difficult to determine how often groupthink actually drives a group decision. Janis' work, after all, was primarily the result of analyzing a very small number of policy decisions. Research is scant on how national or cultural differences affect groupthink. In the area of foreign-policy decision-making – Janis's primary source of analytical material – there are an enormous variety of groups and group processes that play into the decision-making. Moreover, there are other aspects of small group behavior that are relevant when analyzing policy-making by small groups. Additionally, policy-making and advisory groups are generally embedded in larger institutions and other constraints that impact the small group's performance. Ultimately, executive decision-making is characterized by difficult trade-offs, including trade-offs between competing priorities, policy quality versus obtaining support for implementation, and determining how much decision-making resources (including the decision-maker's own time) to devote to determining the best option. Nonetheless, Janis' theory is worth considering in the context of strategic-level decision-making.

¹²⁸ Janis, 226.

¹²⁹ *Ibid.*, 230 (emphasis added).

¹³⁰ *Ibid.*, 230. One should note the value of attorneys to the group, even outside of the groupthink phenomenon. In analyzing Enron's collapse, a recent author has stated that the directors of Enron lacked "vigilant attention" when making far-reaching decisions: "[C]ompany directors, the Senate investigation revealed, also fell short in acquiring the essential information for making the vigilant decisions required by their oversight role. In 2001, for example, the board's compensation committee approved pay plans that gave 65 Enron executives a total of \$750 million for their work in 2000, a year in which Enron's total net income was only \$975 million. When directors were later asked by a Senate investigator why they had approved such exceedingly generous packages - an average of \$11.5 million for each of the more than five dozen executives - they confessed that the \$750 million had come from several distinct incentive programs and that nobody on the compensation committee had thought to add up the numbers before approving the programs." Michael Useem, "The Essence of Leading and Governing is Deciding," in *Leadership and Governance from the Inside Out*, ed. Robert Gandossy and Jeffrey Sonnenfeld (Hoboken, NJ: John Wiley & Sons, Inc., 2004), 68 – 69. Army attorneys, with their education, training, and ethical duty to the Army as client, if appropriately empowered by strategic leaders, can be effective in assuring that policy-making bodies pay necessary "vigilant attention."

¹³¹ If I had a nickel for every time someone has said "just keep me legal, judge," I would be a rich man today.

